Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE UPJOHN COMPANY,
Petitioner,

v.

BEVERLY SCOVISH,
ADMINISTRATRIX OF THE ESTATE OF
WALTER SCOVISH,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
R. CORNELIUS DANAHER, JR.
VINCENT A. ERRANTE, JR.
DANAHER, TEDFORD, LAGNESE & NEAL, P.C.
700 Capitol Place
21 Oak Street
Hartford, CT 06106-8000
(203) 247-3666

ANDREW SEE
(Counsel of Record)
PAUL D. SNYDER
SHOOK, HARDY & BACON L.L.P.
2800 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550
Counsel for The Upjohn Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Does the compelled, uncompensated disclosure to opposing counsel of a computer database, which was created by lawyers at great expense and with the reasonable expectation that it would be protected against disclosure under the work product rule, amount to an unconstitutional taking of property without just compensation?

PARTIES TO THE PROCEEDINGS

Petitioner The Upjohn Company is a wholly-owned subsidiary of Pharmacia & Upjohn, Inc. The Upjohn Company has the following partly owned subsidiaries: Korea Upjohn Ltd., Nuova ICC-Upjohn S.p.A., P.T. Upjohn Indonesia, Saudi Urethane Chemicals Co., Unipharma S.A., Upjohn Pakistan (Private) Limited, Upjohn Suzhou Pharmaceutical Co. Limited and Yusafarm d.o.o.

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BEVERLY SCOVISH,
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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Connecticut

---

PETITION FOR A WRIT OF CERTIORARI

The Upjohn Company respectfully petitions for a writ of certiorari to review the judgments of the Connecticut Supreme Court and the Connecticut Appellate Court in this case.

OPINIONS BELOW

The Memorandum Decision of the Superior Court, Judicial District of New London, Connecticut, granting respondent's motion to compel discovery and ordering the disclosure of certain portions of petitioner's litigation support database, is reproduced at page 3a of the Appendix to this Petition ("Pet. App."). The order denying petitioner's motion to reargue is reproduced at Pet. App. 11a. The Order of the Connecticut Appellate Court, granting respondent's motion to dismiss petition-

er's appeal, is reproduced at Pet. App. 2a. The Order on Petition for Certification to Appeal of the Connecticut Supreme Court, denying petitioner's petition for certification to appeal from the decision of the Appellate Court, is reproduced at Pet. App. 1a.

JURISDICTION

The judgment of the Connecticut Appellate Court granting respondent's motion to dismiss petitioner's appeal was entered on March 20, 1996. The Connecticut Supreme Court denied certification to appeal on May 9, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

U.S. Const. amend. XIV, § 1.

Connecticut Practice Book Section 219 is also generally relevant here and provides:

> **Scope of discovery-materials prepared in anticipation of litigation; statements of parties.** Subject to the provisions of Sec. 220, a party may obtain discovery of documents and tangible things otherwise discoverable under Sec. 218 and prepared in anticipation

> of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the showing has been made, the court shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation. . . .

Conn. Practice Book § 219.

STATEMENT OF THE CASE

This case presents an issue arising from the application of computer technology to the litigation process: whether a trial court is prohibited by the Taking Clause of the Constitution from ordering one party to turn over its attorneys' computerized work product to its opponent. This question will only become more important because of the rapidly growing use by attorneys of computerized litigation support and document retrieval systems to manage information in repetitive litigation involving large numbers of documents. This case concerns the use of computer technology to organize potentially relevant client documents and compile information about them in a computer database to assist in their retrieval and analysis.

Lawyers have created computer databases of information about client documents with the reasonable expectation that they would be protected against disclosure under the work product doctrine; the client documents themselves are, of course, subject to disclosure under the normal discovery rules. The trial court's decision in this case overthrows that expectation by expropriating the computer database created by petitioner's attorneys and requiring that it be turned over to respondent—without

ordering any payment of compensation to petitioner who has invested considerable expenditure of time and money to create and maintain this database.

Petiitoner has been named as a defendant in a number of product liability lawsuits relating to the manufacture and sale of the prescription sleeping medication Halcion®. In consultation with petitioner's in-house attorneys, petitioner's outside attorneys designed and developed a plan whereby potentially relevant internal company documents would be collected and organized so that they could be efficiently utilized in the defense of product liability lawsuits. Petitioner's attorneys determined which documents to collect; not all documents pertaining to Halcion® were gathered as a part of this plan. The selected documents were number-stamped and coded, in a process designed and supervised by petitioner's attorneys, to capture information about each document in a computer database.

The database, which is maintained at the offices of petitioner's outside counsel, consists of computer records of both objective identifying information (e.g., author, title) and subjective analysis and comments referencing hundreds of thousands of documents selected from petitioner's files. The documents referred to in the database include many that respondent has not requested in discovery in this case. The database is used only by petitioner's outside counsel in defense of litigation against petitioner; it is not used in the regular course of petitioner's business. The database is used to identify and locate documents that may be responsive to discovery requests by plaintiffs in product liability lawsuits, for trial preparation by petitioner's outside counsel and to keep track of the production of confidential documents in product liability lawsuits. Access to the database is restricted to petitioner's outside attorneys and those working under their supervision and at their direction.

Respondent filed this lawsuit against petitioner on April 7, 1993, seeking to recover for the alleged wrongful death of her decedent as a result of taking Halcion®.

Respondent initially filed broadly-worded discovery requests seeking categories of documents relating to all Halcion® clinical studies. Petitioner invited respondent to inspect the Halcion® New Drug Application, numbering approximately 500,000 pages, which embodies the entirety of petitioner's submission to the Food and Drug Administration regarding the safety and efficacy of Halcion®. Respondent declined to inspect these documents.

In response to the trial court's discovery order, petitioner assembled and offered to produce to respondent an additional 142,000 pages of documents responsive to respondent's specific document requests. Respondent was requested to reimburse petitioner for the copying expense at the $0.12 per page rate set by the trial court, approximately $17,000.00. Respondent indicated that she would not accept the production of these documents and refused to pay the copying costs, although previously ordered by the trial court to do so.

Respondent learned of the computer database described above and moved that petitioner be compelled to produce it, arguing that respondent's use of the database would "streamline discovery" and save her considerable time and expense by avoiding the duplication of effort involved in reviewing documents and creating her own system to identify and retrieve documents. Petitioner opposed production of its computer database on the ground that the database was prepared by outside counsel in anticipation of litigation and thus constitutes attorney work product protected from discovery by Connecticut Practice Book Sec. 219. Petitioner further argued that respondent did not need the computer database to prepare her case because petitioner was prepared to produce any and all discoverable documents in response to specific document requests.

On November 22, 1995, the trial court entered an order which granted respondent's motion to compel and ordered

that the computer database be produced (excluding the subjective thoughts, opinions, strategies or legal theories of petitioner's attorneys). The court agreed with petitioner that the computer database is attorney work product because it was produced in anticipation of litigation and because of the substantial attorney involvement in selection, coding and categorization of the documents. The trial court noted, however, that the computer database would be of substantial value to respondent in preparing her case against petitioner and that respondent should not have to bear the considerable expenditure of time and money required to review petitioner's documents relating to Halcion® and gather for herself the information contained in the petitioner's computer database. The trial court stated:

> Merely offering the [respondent] to search a warehouse in order to retrieve relevant documents is unrealistic and needlessly time consuming given the fact that an index and database exists that can expedite discovery and level the playing field.

Pet. App. at 9a.

Petitioner moved that the motion to compel be reargued on the grounds that 1) respondent had not demonstrated substantial need to overcome the protection of the attorney work product doctrine, and 2) the trial court's ruling constituted a "taking" of petitioner's property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The trial court's denial of petitioner's motion to reargue on January 3, 1996, did not address petitioner's constitutional argument.

On January 22, 1996 petitioner filed its appeal in the Connecticut Appellate Court, raising all issues presented to the trial court below. Respondent moved to dismiss for lack of jurisdiction on the ground that a discovery order is not subject to appellate review under Connecticut law, citing *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252,

520 A.2d 605 (1987). The Appellate Court granted respondent's motion and did not address petitioner's constitutional arguments. Pet. App. at 2a.

On April 9, 1996, petitioner filed a petition for certification to appeal with the Connecticut Supreme Court which was denied without comment on May 9, 1996. Pet. App. at 1a.

REASONS FOR GRANTING THE WRIT

Whether a trial court effects an unconstitutional taking by ordering a party to turn over to its opponent, without compensation, its litigation computer database is an issue of serious import for modern litigation practice.

The use of modern technology, and particularly the creation of computer databases to manage, retrieve and analyze voluminous documents, has had a remarkable and beneficial effect on litigants and the courts. Computer databases have become a nearly indispensable adjunct to complex litigation. Because of the computer-assisted capacity to recognize, identify, retrieve, analyze and manage voluminous documents, litigants are newly able to prepare complex cases efficiently and the courts are better able to manage their dockets.

Both producing and discovering parties receive great benefit from the application of computer technology to complex litigation. A computer document database permits a litigant to produce documents efficiently in specific response to an opponent's request rather than simply direct the opponent to a document warehouse or archive where the opponent must conduct a laborious, time-consuming and expensive manual search. The inefficiencies of pre-database document discovery are compounded in repetitive litigation, in which the document archive or warehouse must be manually searched over and over again by successive discovering parties.

The trial court's ruling creates an undesirable precedent that will affect not only the Halcion® litigation, but every litigation in which issues are complex and documents voluminous. The trial court's ruling has already been cited as precedent by a plaintiff seeking production of the petitioner's document database. *Ungar v. The Upjohn Company*, No. 92 L 7280 (Cir. Ct., Cook County, Illinois). The identical issue has arisen in other product liability litigation and is the subject of a petition for writ of certiorari pending before this Court. *Minnesota v. Philip Morris, Inc.*, No. C-1-94-8565 (Dist. Ct., Ramsey County, Minn.), *petition for cert. filed*, 64 U.S.L.W. 3692 (U.S. Apr. 5, 1996) (No. 95-1611). News of trial court's order that petitioner's computer database be produced to respondent has been disseminated widely in litigation circles. *See, e.g.*, 1996 Pharmaceutical Litig. Rep. (Andrews) 11,108 (Feb. 1996); 1 Litig. Rep.: Drugs & Med. Devices (Mealey's) No. 1 (Jan. 8, 1996); 39 ATLA Law Reporter 71 (March, 1996); 15 Conn. L. Rptr. 446 (1996).

Many companies whose products or services are the subject of recurrent litigation have invested large sums of money to create computer databases of information from potentially relevant documents. *See* William E. Cwiklo, *Image Management Systems In Litigation Support*, Legal Economics, Nov.-Dec. 1987, at 54 ("Over the past 10-15 years, computerized document retrieval systems have become commonplace in document-intensive litigations such as massive product liability and anti-trust cases."). Many potential litigants presented with the possibility of recurrent litigation involving voluminous documents are now considering whether to invest time and money in the creation of such litigation databases. The trial court's decision below presents every such litigant with the question whether it should spend significant sums of money to create and maintain a litigation database if it may be ordered to turn over such property to

its opponent, that the opponent may more conveniently and efficiently prosecute a claim against it.

The trial court's decision presents a disincentive to create litigation support computer databases. Attorneys' use of modern technology will be inhibited and clients will be far less willing, or unwilling, to direct their counsel to create expensive computer databases which are at risk of being expropriated by a trial court and turned over to the opponent in litigation. The result is a step backward to a less modern, more inefficient litigation system where trial preparation and vigorous advocacy is discouraged, all of which enures to the detriment of litigants and society in general. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (if work product were freely available to the opponent, "the interests of clients and the cause of justice would be poorly served"); C.J. Poirier, *Computer-Based Litigation Support Systems*, 54 UMKC L. Rev. 440, 456-57 (1986) (discovery of litigation support systems is a disincentive to create such systems and will reduce the efficiency of litigation).

THIS COURT SHOULD DECIDE WHETHER THE TAKING CLAUSE BARS A TRIAL COURT ORDERING A LITIGANT TO TURN OVER TO ITS OPPONENT, WITHOUT COMPENSATION, A COMPUTER LITIGATION DATABASE DEVELOPED AT GREAT EXPENSE SOLELY FOR USE IN LITIGATION.

The trial court's order requiring that petitioner turn over to respondent its litigation database is an uncompensated "taking" prohibited by the Fifth Amendment, which is applied to the states through the Due Process Clause of the Fourteenth Amendment. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) this Court held that the Taking Clause prohibits the uncompensated appropriation of property in the form of confidential information developed by a party at great expense and kept confidential from others. Federal and state law and court

rules protect from discovery the work product created by lawyers for the sole purpose of representing their clients in litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947), and the subsequent case law and court rules in Connecticut and other states which embody its reasoning, have created a reasonable expectation by litigants and their counsel that certain informational property created by counsel for use in litigation will be preserved for their own use and will not be turned over to their opponents. The trial court's order, requiring that petitioner's litigation database be turned over to its opponent so that the opponent may use it to prosecute a civil claim against petitioner, destroys that expectation and expropriates that property interest without compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005.

A. Petitioner's Litigation Database Is Property Under The Fifth And Fourteenth Amendments.

The computer litigation database at issue in this case is property in which petitioner has a protectable interest. Petitioner decided to create the database in consultation with its outside attorneys. Petitioner directed its outside attorneys to design, create and maintain the database. Petitioner invested significant resources of time and money to create and maintain the database.

This Court has held that information created by a party, particularly if the information is confidential and the owner excludes others from using it, is property within the meaning of the Taking Clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1003 ("Intangible property rights protected by state law are deserving of the protection of the Taking Clause"). As in *Ruckelshaus v. Monsanto*, petitioner has (1) expended significant time and financial resources to create and develop its litigation database and (2) has "instituted stringent security measures to ensure the security" of the database which would be very valuable to respondent as petitioner's opponent in

civil litigation. *See Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("[c]onfidential business information has long been recognized as property.").

Upjohn also has a legally cognizable "property" interest in its computer litigation database under federal copyright law. *See* Copyright Act of 1976, 17 U.S.C. §§ 102-03, 106, 201(a)-(b) (copyright protection extends to "authors" of computer databases and the "employer or other person for whom the work was prepared is considered the author.")

B. The Taking Clause Applies To A Court Order Directing That A Litigant's Property Be Turned Over To Its Opponent Without Compensation.

The Taking Clause of the Fifth Amendment prohibits the government from taking private property without just compensation and applies to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & O. R.R. v. Chicago*, 166 U.S. 226, 249 (1897). This Court has specifically held that the Taking Clause applies to the act of a state court whereby private property is taken without compensation. *Chicago v. B. & O. R.R. v. Chicago*, 166 U.S. at 239. Lower federal courts have specifically recognized that court-ordered disclosure of confidential information during discovery implicates the protection of the Taking Clause of the Fifth Amendment. *E.g., Grundberg v. Upjohn Company*, 140 F.R.D. 459, 464 (D. Utah 1991) ("production of such discovery documents could violate plaintiffs' rights to due process of law and may constitute a taking of private property for public use without just compensation").

The informational property contained in petitioner's litigation database reflects a significant investment of time and money by petitioner and its compelled disclosure without compensation amounts to an unconstitutional "taking." Under the three-factor analysis employed by

the Court to determine whether a "taking" has occurred within the meaning of the Fifth Amendment, it must be concluded that a "taking" has occurred in this case. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005 ("character of the government action, its economic impact and its interference with reasonable investment backed expectations".)

There is no question that the trial court's order will have a severe economic impact on petitioner. Petitioner has expended substantial sums to create and maintain the computerized litigation database for the use of its counsel in defending product liability lawsuits. If the database is provided free to respondent, much of its value to petitioner will be lost. The Court recognized in *Ruckelshaus v. Monsanto Co.* that disclosure of confidential information to a competitor would destroy the competitive advantage the confidential information provides to its owner. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1012 n.15.

The value of the litigation database to petitioner is no different than its value to respondent. The ability to identify, locate, retrieve and analyze documents permits anyone using the database to more efficiently litigate Halcion® product liability lawsuits. Respondent clearly recognized the property value of the database. She has attempted to acquire it specifically to avoid spending time reviewing petitioner's documents and to avoid spending money for copies of documents. If the database is turned over to respondent, it will enable respondent to more efficiently prosecute her claim against petitioner.

The trial court's order destroys petitioner's reasonable investment-backed expectations regarding the computer database. The database was created with the expectation, based upon the work product doctrine long recognized in both federal and state courts including the courts of Connecticut, that it would be protected against disclosure

in discovery. Petitioner and its outside litigation counsel acted in the sure belief that by preserving the confidentiality of the database it would be protected and would not be used adverse to petitioner's interests in the litigation. This litigation database is classic attorney work product which merits protection from discovery under the rationale of *Hickman v. Taylor*, and as codified in Connecticut Practice Book Section 219. Petitioner reasonably expected that the database would remain confidential and would not be turned over to its opponent in civil litigation. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1005-06.

Finally, the trial court's order requiring that the litigation database be turned over to petitioner's opponent in civil litigation abrogates petitioner's right to exclude others from its property, a right "universally held to be a fundamental element of the property right." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1011; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Because there was no compensation nor method to seek compensation provided in the trial court's order directing that petitioner's litigation database be turned over to respondent, such order constitutes a "taking" prohibited by the Constitution. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1016. The Taking Clause prohibits the trial court from expropriating petitioner's litigation database, created through significant investment of time and money, and providing it to respondent without cost.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:
R. CORNELIUS DANAHER, JR.
VINCENT A. ERRANTE, JR.
DANAHER, TEDFORD, LAGNESE & NEAL, P.C.
700 Capitol Place
21 Oak Street
Hartford, CT 06106-8000
(203) 247-3666

ANDREW SEE
(Counsel of Record)
PAUL D. SNYDER
SHOOK, HARDY & BACON L.L.P.
2800 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550
Counsel for The Upjohn Company

APPENDIX

APPENDIX

SUPREME COURT
STATE OF CONNECTICUT

No. PSC-95-0304

BEVERLY SCOVISH, ADMINISTRATRIX OF THE ESTATE OF WALTER SCOVISH

v.

THE UPJOHN COMPANY *et al.*

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant The Upjohn Company for certification to appeal from the Appellate Court [AC 15618], it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

/s/ Alan M. Gannuscio
Assistant Clerk-Appellate

Dated: May 9, 1996
Notice sent: May 10, 1996
Clerk, Superior Court, New London (CV93-05265205)
Clerk, Appellate Court
Reporter of Judicial Decisions
SAO
Danaher, Tedford, Lagnese & Neal, P.C.
The Reardon Law Firm, P.C.
Faulkner & Boyce

R. Cornelius Danaher, Jr. and *Vincent A. Errante, Jr.* in support of petition; *Angelo A. Ziotas* in opposition.

APPELLATE COURT
STATE OF CONNECTICUT

No. A.C. 15618

BEVERLY SCOVISH, ADMINISTRATRIX

v.

THE UPJOHN COMPANY *et al.*

March 20, 1996

ORDER

THE MOTION OF THE PLAINTIFF-APPELLEE, FILED JANUARY 30, 1996, TO DISMISS APPEAL,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED GRANTED.* THE REQUEST FOR A HEARING IS HEREBY DISMISSED.*

**Schaller, J. is recused.*

BY THE COURT,

/s/ Suran Reeve
Assistant Clerk—Appellate

Notice sent: 3/21/96
The Reardon Law Firm
Danaher, Tedford, Lagnese & Neal
Faulkner & Boyce
Hon. D. Michael Hurley
Clerk, Superior Court, New London
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SUPERIOR COURT
JUDICIAL DISTRICT OF NEW LONDON
AT NEW LONDON

No. 526520

BEVERLY SCOVISH, ADMINISTRATRIX

v.

THE UPJOHN COMPANY, *et al.*

November 22, 1995

MEMORANDUM OF DECISION

FACTS

The plaintiff, Beverly Scovish (Scovish), brought an action against the defendant, the Upjohn Company (Upjohn), alleging that her husband's suicide was caused by the side-effects of Halcion, an allegedly defective prescription drug manufactured by Upjohn. Before the court is plaintiff's motion to compel the production of a so-called bates-stamp index (index) and database of the defendant.

During the course of discovery, the plaintiff learned of a document retrieval system constructed by the defendant's attorneys. The system was constructed in an effort to comply with discovery requests of other plaintiffs as well as to assist Upjohn's attorneys in the preparation of its defense in this case and other Halcion cases pending nationally. In coding many documents related to Halcion, Upjohn has also allegedly produced a bates-stamp index

and database that references and indexes many pertinent documents and studies of Halcion. Upjohn claims that the index and the database are protected from discovery because the material is opinion work product. According to Upjohn's brief, "the decision to collect the documents, their organization and the methodology employed all reflect the decisions and mental impressions of litigation attorneys in response to litigation needs in pending Halcion cases." (Defendant's brief, p. 7). Even if the court were to find that the index and database are merely fact work product, Upjohn asserts that Scovish has failed to demonstrate a substantial need for them. Upjohn proffers that it has previously given Scovish the opportunity to visit a document repository in Kalamazoo, Michigan where she could wade through thosuands of pages of documents and select relevant files to copy.

In support of her motion to compel the production of the index and database, the plaintiff asserts that it is not protected under the work product doctrine, and that even if it is, the index is ordinary work product for which the plaintiff has a substantial need. According the plaintiff, "her 'substantial need' flows from the very nature of this action. As the plaintiff claims that Halcion was, and is, a defective pharmaceutical product, she needs many of the hundred of thosuands of documents, in the defendant's possession . . . . Second, the plaintiff is unable without undue hardship to obtain the substantial equivalent of the material by any other means." (Plaintiff's brief, p. 14)

DISCUSSION

"The discovery rules are designed to facilitate trial proceedings and to make a 'trial less a game of blindman's b[l]uff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." *Caccavale v. Hospital of St. Raphel*, 14 Conn. App. 504, 507, 541 A.2d 893, cert. denied, 208 Conn. 812, 541 A.2d 1241 (1988), quoting *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958). "The granting or

denial of a discovery request rests in the sound discretion of the court . . . . Discretion is limited, however, by the rules pertaining to discovery." (Citation omitted; internal quotation marks omitted.) *Beal v. Washton*, 39 Conn. Supp. 167, 168, 472 A.2d 812 (1983).

Our Supreme Court has noted that "[w]ork product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. The attorney's work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys." *Stanely Works v. New Britain Redevelopment Agency*, 155 Conn. 86, 95, 230 A.2d 9 (1967). Subsequently, the definition of work product was refined and codified by Practice Book § 219 which states:

> Subject to the provisions of Sec. 220, a party may obtain discovery of documents and tangible things otherwise discoverable under Sec. 218 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Based on the defendant's brief and attached affidavits, the court is convinced that the bates-stamp index and database constitute attorney work-product. In his affidavit, Attorney Harold J. Decker, a vice-president of corporate law-litigation at Upjohn, avers that in 1989 certain Halcion related documents were collected and

later codified in response to other discovery requests. (Defendant's exhibit 8, Affidavit of Harold S. Decker, Esq. ¶ 6). Attorneys for Upjohn also sifted through the reams of documents and selected other relevant files that the legal staff thought would be useful in any pending or subsequent litigation, but not all "files or categories of Halcion documents were collected." (Defendant's exhibit 8, Affidavit of Harold S. Decker, Esq. ¶ 7). Once the files and documents were selected, they were bates-numbered, and then information about each document was entered into a computer data base. (Defendant's exhibit 5, Affidavit of Vivian W. McLeod, Esq. ¶ 5).

The court finds that the bates-index and accompanying data base are work product under Practice Book § 219 because they were produced in anticipation of litigation, and because of substantial attorney involvement in the selection, coding, and categorization process.

A finding of work-product, however, does not end the analysis. The court must determine whether the bates-stamp index and database constitutes "opinion work product" or "ordinary or fact work product." "Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws. . . ." *Sporck v. Peil*, 759 F.2d 312, 316 (2nd Cir. 1985). Under Practice Book § 219, opinion work product is highly protected, and does not appear to be discoverable. See *Capalbo v. The Balf Company*, 9 CSCR 285 (Feb. 28, 1994). On the other hand, ordinary work product is any material that does not meet the definition of opinion work product, and can be ordered produced upon a showing of substantial need and undue hardship. See, 4 *Moore's Federal Practice Digest* ¶ 26.15[3].

The defendant relies on *Sporck v. Peil, supra*, 759 F.2d 316 for the proposition that "[t]he selection and compilation of documents by counsel . . . in preparation for pretrial discovery falls within the highly-protected

category of opinion work product." Id. 316. The court noted:

> In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this . . . the process of selection and distillation is often more critical than pure legal research.
>
> Id.

Because the defendant's attorneys sifted through thousands of documents and selected those that they thought were relevant, Upjohn claims that the index and database to these documents or files constitutes opinion work product.

In *Sporck*, the plaintiff had previously discovered and retained the documents at issue, and he merely wanted the defendant to identify those documents which defense counsel has selected in preparing the defendant for his deposition. The court held that the selected documents, out of thousands previously produced, constituted non-discoverable opinion work product merely because they had been specially selected by defense counsel in preparing his client. In a strongly worded dissent, Judge Seitz noted:

> [p]resumably, the petitioner's argument must be that if the respondents knew which documents were reviewed, they could, upon examination of the documents identified, draw conclusions as to why each document was chosen.
>
> The problem with the petitioner's theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent.
>
> Id. 319.

Reflecting the concern of the dissent in *Sporck*, the United States Court of Appeals for the Second Circuit, in *Gould v. Mitusi Mining & Smelting Co.*, 825 F.2d 676, 679-80 (2nd Cir. 1987) noted that:

> [d]ocuments received by [defense counsel] from its clients, which would not be privileged if they remained in clients' hands, would not acquire [work product] protection merely because they were transferred to [counsel]. The narrow exception to this rule formulated in [Sporck] that the selection and compilation of documents by counsel for litigation purposes is protected opinion work product, may be applicable, *but its application depends upon the real, rather than speculative, concern that the thought process of . . . counsel in relation to pending or anticipated litigation would be exposed.* Furthermore, the equities might not favor the application of the *Sporck* exception if the files from which documents had been culled by [counsel] were not otherwise available to [the party] or were beyond reasonable access to [the party].
>
> (Emphasis added.)

Thus, the *Sporck* rule does not seem to be as absolute as the defendant asserts. Moreover, Upjohn's concern that the plaintiff might discover the thoughts, opinion and the strategies of defense attorneys must be real, and not based on speculation. By defendant's own admission, "a print-out of database information for all documents that have been collected would number more than one hundred thousand pages." (Defendant's exhibit 5, Affidavit of Vivian W. McLeod, Esq. ¶ 8) Because of the astronomical number of documents involved in this case, it is highly unlikely that Upjohn's mental impressions would be exposed by production of such an index or database. The sheer amount of documents involved is what led the plaintiff to seek the index and database in the first place.

To the extent that the bates-stamp index and database contain the written subjective comments as to the value, theory or strategy behind the selection of documents or files, such comments constitute opinion work product which should be redacted from the material. On the other hand, the mere identification of a document or files selected by Upjohn (i.e. by title, date sent, author, recipient, etc.,) to be included in the index or database constitutes ordinary work product. Even if the court's categorization of this material is erroneous, the court finds that the defendant has not shown that there is any realistic chance that the mere identification of the documents would disclose legal strategies or theories of their defense. Furthermore, the equities of the situation favor production of the index and database by the defendant.

The plaintiff's underlying suit claims that Upjohn manufactured a defective pharmaceutical product. The development, testing, manufacture and governmental review of this drug, as the discovery battles of this case demonstrate, produced hundreds of thousands of documents that the plaintiff has a right to review. Merely offering the plaintiff to search a warehouse in order to retrieve relevant documents is unrealistic and needlessly time consuming given the fact that an index and database exists that can expedite discovery and level the playing field. Thus, the court finds that the plaintiff has demonstrated a substantial need for the bates-stamp index and database, and that undue hardship would exist if the index and database were not produced.

Relying on this court's broad discretion in fashioning discovery orders, the court orders that the defendant supply the plaintiff with a copy of its bates-stamp index and accompanying database after the defendant has redacted those portions of the material which may contain the subjective thoughts, opinions, strategies, or legal theories of its attorneys. To the extent that this material is contained in a computerized format or stored on magnetic

tape(s) or other like electronic storage devise(s), the defendant can supply the plaintiff, at her request, with said material in lieu of a printed hard copy.

CONCLUSION

Subject to the above-stated limitations, the plaintiff's motion to compel production of the bates-stamp index and database is granted, and the defendant's objection is overruled.

/s/ Hurley, J.
HURLEY

P.O. Box 671
70 Huntington Street
New London, Connecticut 06320

Notice Issued 01/03/96

Doc. No. CV-93-0526520-S

PLTF SCOVISH, BEVERLY

VS.

DFDT UPJOHN COMPANY, *et al.*

PLEASE BE ADVISED THAT THE FOLLOWING ORDER HAS BEEN ENTERED ON THE ABOVE CASE

203-00 Motion to Reargue File Dt 12/18/95
Dend—Date 01/02/95 Judge Hurley, J.

204-00 Objection to Motion File Dt 12/18-95
Sust—Date 01/02/96 Judge Hurley, J.

Direct Inquires to Clerks Office, Jud. Dist.
Superior Court
P.O. Box 671
70 Huntington Street
New London, Connecticut 06320

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1902

In The

Supreme Court of the United States

October Term, 1995

THE UPJOHN COMPANY,

Petitioner,

vs.

BEVERLY SCOVISH, Administratrix of the Estate of WALTER SCOVISH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO A. ZIOTAS
Counsel of Record
ROBERT I. REARDON, JR.
THE REARDON LAW FIRM, P.C.
Attorneys for Respondent
160 Hempstead Street
New London, Connecticut 06320
(860) 442-0444

9072
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Did the Connecticut state court's pre-trial discovery order, which compelled the production of the ordinary work product portions of a computer database, which organized over one million (1,000,000) documents relating to the pharmaceutical product at issue in the case, violate the petitioner's Fifth Amendment rights so as to amount to an unconstitutional "taking of property"?

PARTIES TO THE PROCEEDINGS BELOW

The respondent is the plaintiff in an underlying action as an individual as well as in her capacity as the Adminstratrix of her late husband's estate. The defendants in this action are the petitioner and Eric N. Thompson, M.D.

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The respondent, Beverly Scovish, respectfully requests that this Court deny the Petition for a Writ of Certiorari. The petition seeks review of the Connecticut Supreme Court's finding that the intermediate appellate court did not abuse its discretion in determining that a trial court's pre-trial discovery order was not a final judgment. The appellate court's determination compelled the dismissal of the petitioner's state court appeal.

STATEMENT OF JURISDICTION

To create jurisdiction under 28 U.S.C. § 1257, an asserted federal question must have been considered and decided by the applicable state court. *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). The respondent submits that the constitutional issue raised by this petition was never considered or decided by a Connecticut state court.

Moreover, an asserted federal question must be "substantial" and not so "absolutely devoid of merit as to be frivolous." *Equitable Life Assur. Soc'y v. Brown*, 187 U.S. 308, 311 (1902). The petition in the instant case fails to meet even this minimal threshold; the underlying decision, a trial court, pre-trial discovery order compelling the disclosure of material arguably protected by the "work product" doctrine, does not create a substantial federal question which merits this Court's review.

STATEMENT OF THE CASE

The petitioner seeks review of a discovery order, issued by the Connecticut Superior Court (trial court) on November 22, 1995. The discovery order which gives rise to this petition issued after two separate lengthy oral arguments, two rounds of briefing and a thorough review of the applicable Connecticut law by the trial court. Since that time, the petitioner has sought to avoid

complying with this ruling by appealing this interlocutory order. The petitioner followed that course despite the fact that discovery orders, even those which compel the disclosure of arguably privileged material, are not final judgments under Connecticut law. *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 521 A.2d 605 (1987). This case arises out of the wrongful death of the respondent's decedent, Walter Scovish. Mr. Scovish's death was allegedly caused by side effects of the petitioner's prescription sleep medication, Halcion. Halcion has had an extremely controversial history, including having been the subject of a recent report by the United States Food and Drug Administration. This report was issued by a special task force and came to a number of conclusions, including that,

> . . . further inquiry into allegations of criminal misconduct by Upjohn is most appropriately the subject of consideration by the Department of Justice, which has additional investigative authority (e.g., subpoena power) and Federal prosecutorial responsibility.

Report of the Halcion Task Force U.S. Food and Drug Administration, at page 29. In addition to this recent FDA action, a number of other countries have banned the sale of Halcion, including Great Britain.

As would be expected in a complex, pharmaceutical product liability action, discovery has been bitterly resisted and aggressively fought by this petitioner. The respondent has consistently sought ways to streamline discovery, as the relevant documents would total over one (1) *million* pages. However, one common technique for streamlining discovery was not available to the respondent in the action. The respondent was prohibited from sharing many documents with other similarly situated

plaintiff's counsel. Over one hundred other Halcion cases have been filed nationwide and in all but one other case, Upjohn has obtained "blanket" protective orders. These protective orders severely restrict the ability of plaintiffs to pool resources and share the expense relating to document production.

As respondent's counsel knew about these protective orders from the outset of this matter, a discovery request was submitted to Upjohn for computer databases. The respondent's request was intended to facilitate the transfer of documents and to minimize the respondent's search for damaging "needles" in Upjohn's Halcion "haystack." Upjohn objected to this request, which was filed on August 23, 1993. Despite its objection, over the next two (2) years Upjohn provided information regarding the existence of various computerized databases in response to repeated inquiries by respondent's counsel. Finally, Upjohn admitted to having a comprehensive database regarding Halcion related documents.

This comprehensive database involves a massive number of documents. As the trial court observed,

> [b]y defendant's own admission, "a print-out of database information for all documents that have collected would number more than one hundred thousand pages." (Defendant's exhibit 5, Affidavit of Vivian W. McLeod, Esq. ¶ 8)

Petitioners Appendix ("P.A.") 8a. The underlying documents would many additional pages, as, "[t]he development, testing, manufacture and governmental review of this drug . . . produced hundreds of thousands of documents that the plaintiff has the right to review." *Id.* The trial court recognized the need to streamline discovery, and therefore, ordered that Upjohn

provide the respondent with a copy of this comprehensive database redacting those portions which would constitute "opinion" work product.

This order entered after two (2) separate oral arguments and extensive briefing, which included detailed affidavits by the petitioner regarding the nature of this database. The trial court's decision was based upon a factual finding that the respondent had a substantial need for the database which outweighed any work product privilege. P.A. at 9a. Upjohn appealed that decision and on March 20, 1996 the Appellate Court granted the respondent's Motion to Dismiss, agreeing that the trial court's order was interlocutory. On May 9, 1996, the Connecticut Supreme Court denied certification and in doing so refused to review the propriety of the Appellate Court's decision.

REASONS FOR DENYING THE WRIT

I.

THE PURPORTED FEDERAL QUESTION RAISED BY THE PETITION WAS NOT CONSIDERED OR DECIDED BY A STATE COURT.

In this petition, Upjohn asserts that the order at issue deprives it of property without just compensation in violation of the Fifth Amendment and seeks review pursuant to 28 U.S.C. § 1257. However, in order for this issue to be properly before this Court, Upjohn must have presented the issue for determination by a state Court. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 313, fn. 8 (1987); (citing *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1912)). In this regard, the petition is lacking.

While the petitioner claims to have raised this issue in the

Connecticut Courts, that assertion misstates the record. Petition ("Pet.") at 6-7. As demonstrated below, the petitioner failed to present and preserve any federal issue for review in the Connecticut court system.

The discovery order at issue followed the respondent's Motion to Compel filed in the trial court. *No where* in the extensive materials submitted in opposition to this Motion did the petitioner raise a federal question, much less one of constitutional magnitude. Moreover, the petitioner failed to raise any federal questions in any of its submissions to the appellate courts in the State of Connecticut. This omission occurred at the Connecticut appellate court in the petitioner's Preliminary Statement of Issues and in its Memorandum of Law in Opposition to Appellee's Motion to Dismiss Appeal and Request for Hearing. Likewise, the petition failed to raise the Fifth Amendment issue in its Petition for Certification to the Connecticut Supreme Court.

The petitioner referred to the Fifth Amendment on only one occasion in the entire Connecticut court system. After the trial court granted the respondent's Motion to Compel, the petitioner filed a Motion to Reargue Plaintiff's Motion to Compel. Therein, Upjohn presented the identical arguments that it offered in response to the respondent's initial Motion: (1) the database constituted work product; and (2) that the respondent had failed to demonstrate a substantial need for the disclosure of the database. As those issues had been fully argued and briefed previously, the Court summarily denied this Motion to Reargue. P.A. at 11a.

In addition to these arguments, the petitioner added the following footnote, which could only be described as an aside:

> The Court's ruling ***may*** also constitute a "taking" of private property for public use

> without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 11 of the Connecticut Constitution. Although the Court has not prohibited Upjohn from using its own database, the Supreme Court has noted: "Government action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984). Here, the Court's ruling will have tremendous and unfair economic impact. It would undermine "all or most" of the value of the Halcion database by giving plaintiff an important tool created and used by Upjohn's attorneys to advise and defend Upjohn in litigation. (Emphasis added).

Defendant The Upjohn Company's Motion to Reargue Plaintiff's Motion to Compel, dated December 12, 1995 at page 5, fn. 2. The manner in which this footnote merely mentions a potential issue in a Motion for Reargument indicates that this issue was not "considered and decided" by a Connecticut court.

The footnote cited above did no more than allude to a possible constitutional issue. Pursuant to Connecticut law, "[w]here an issue is merely mentioned but not briefed beyond bare assertion of the claim, it has deemed to have been waived." *Bridgeport Hospital v. Comm. On Human Rights & Opp.*, 232 Conn. 91, 653 A.2d 782 (1995); (citing, *Hayes v Smith*, 194 Conn. 52, 66, n.12, 480 A.2d 425 (1984)). By utilizing the word "may" in the above footnote and failing to develop the legal argument beyond a mere assertion, Upjohn waived the constitutional issue at the trial court. Therefore, no Connecticut

state court considered or decided the federal Constitutional question, consequently depriving this Court of jurisdiction. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 484 (1983).

Moreover, even if one were to assume, *arguendo*, that Upjohn presented the takings issue to the trial court, the issue was subsequently abandoned. The petitioner failed to raise the issue at the Connecticut appellate court in its Preliminary Statement of Issues. This failure continued when the petitioner failed to raise a federal question in it's brief in opposition to the respondent's Motion to Dismiss. Finally, the petitioner failed to raise any federal question in its Petition for Certification to the Connecticut Supreme Court. These failures would again demonstrate that this Court lacks jurisdiction pursuant to 28 U.S.C. § 1257. *Id.*

II.

THE PETITIONER SEEKS REVIEW OF CONNECTICUT STATE COURT'S INTERPRETATION OF A STATE PROCEDURAL RULE, WHICH PERMITS THE DISCLOSURE OF "WORK PRODUCT" AFTER A FACTUAL FINDING OF SUBSTANTIAL NEED.

While the petitioner has attempted to invent a constitutional issue,[1] it seeks review of an order which can be simply described as follows: the trial court found that under the facts of this case, and the procedural rules of the State of Connecticut, the respondent was entitled to obtain "ordinary"[2] work product from the petitioner.

---

1. As indicated above, this constitutional issue was "invented" at this stage of the proceedings, as it had not been previously asserted.

2. The trial court below distinguished between "ordinary" work

(Cont'd)

The trial court issued the discovery order at issue after making a specific factual finding which is required under Connecticut law. Pursuant to § 219 of the Connecticut Rules of Court, a party may obtain materials prepared by an opposing party, or its representative,

> . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id. The trial court specifically found that the plaintiff had made the requisite showing when it ordered the disclosure of the petitioner's database. P.A. at 8a-10a. This determination is solely an issue of Connecticut law, independent of any federal question, and therefore, this Court lacks jurisdiction over the petition. *Michigan v. Long*, 463 U.S. 1032, 1037-38 (1983). As the petition merely takes issue with the trial court's factual finding, a finding premised upon a "properly stated rule of law", this Court should not accept certiorari. Supreme Court Rule 10.

However, even if one were to assume that a properly preserved federal question existed, the petitioner fails to demonstrate that its rights were violated.

A. The trial court's decision correctly applied the work product doctrine.

The petitioner has failed to put forth any rationale which

(Cont'd)
product, which may be discovered under certain circumstances (P.A. at 6a) with "opinion" work product, which contains legal strategy and is ordinarily not discoverable. *Id.*

would support its contention that the trial court misapplied the work product doctrine. As this Court has observed,

> [w]e do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). As this quote illustrates, trial courts have long possessed the discretion to balance competing interests and order the disclosure of work product materials in an appropriate case.

As to the specific disclosure at issue, a computerized database, the only other court to address this issue has likewise ordered the production of a party's database. *See The State of Minnesota, et al. v. Philip Morris, Incorporated, et al.*, Court File No. C1-94-8565 (Dist. Ct., State of Minn.); United States Supreme Court No. 95-1611, *cert. denied*, May 28, 1996. Therefore, unsurprisingly, the petitioner has failed to cite to any authority which holds ordering the disclosure of a litigation database to be improper.

B. The petitioner has failed to demonstrate that the discovery order at issue implicates the takings clause.

The petitioner has failed to cite to any authority which supports the proposition that a pre-trial, discovery order can implicate the takings clause. Moreover, the one case that the petitioner principally relies upon, *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984), is readily distinguishable.

Pursuant to *Ruckelshaus*, the petitioner must make a threshold showing that any property interest which they possess

in this database arises, "from an independent source, such as state law. . . ." *Ruckelshaus*, 467 U.S. at 1002-1004. The petitioner has failed to meet even this initial burden.

However, even if one were to assume that the petitioner can identify a property interest in the computer database, the takings clause would still not be implicated. The petitioners must show (1) an economic impact and (2) an investment-backed expectation that the information from database would not be discoverable. *Ruckelshaus*, 467 U.S. at 1005-06. The petitioner can demonstrate neither .

As to the economic impact, the petitioner could not sell the database, which distinguishes the asset at issue with the "trade secrets" which were the subject in *Ruckelshaus*. *See* Gregory Gelfand, *"Taking" Informational Property Through Discovery*, 66 Wash. U. L.Q. 703, 709 (1988). Moreover, the petitioner has not expressed any fear that its database would be turned over to competitors, *see Ruckelshaus*, 467 U.S. at 1012; rather, it fears that the playing field will be leveled in this litigation.

As to the petitioner's expectations, Upjohn could not, contrary to its claims at pages 12-14 of the petition, claim that it had no expectation its database would be discoverable. The work product doctrine has long been limited in nature, such that all state and federal courts are permitted to order the disclosure of work product under certain circumstances. Given this limitation, Upjohn had to have expected that this database could have been disclosed. These facts compel the conclusion that no takings clause violation has occurred. *Ruckelshaus*, 467 U.S. at 1009-10.

For all of these reasons, lack of a property interest, lack of economic impact and the lack of reasonable expectation of privacy, the petitioner's takings claim lacks merit.

CONCLUSION

The Petition should be denied. Petitioners seek review of a state court discovery ruling by claiming a federal constitutional violation which they failed to present in state court. Furthermore, the state court ruling at issue was legally correct and did not violate the takings clause.

Respectfully submitted,

ANGELO A. ZIOTAS
Counsel of Record
ROBERT I. REARDON, JR.
THE REARDON LAW FIRM, P.C.
Attorneys for Respondent
160 Hempstead Street
New London, Connecticut 06320
(860)442-0444

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No. 95-1902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE UPJOHN COMPANY,
Petitioner,

v.

BEVERLY SCOVISH,
ADMINISTRATRIX OF THE ESTATE OF
WALTER SCOVISH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

---

REPLY BRIEF FOR PETITIONER

Of Counsel:
R. CORNELIUS DANAHER, JR.
VINCENT A. ERRANTE, JR.
DANAHER, TEDFORD, LAGNESE & NEAL, P.C.
700 Capitol Place
21 Oak Street
Hartford, CT 06106-8000
(860) 247-3666

ANDREW SEE
(Counsel of Record)
PAUL D. SNYDER
SHOOK, HARDY & BACON L.L.P.
2800 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550
Counsel for The Upjohn Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	2

REPLY BRIEF FOR PETITIONER

Pursuant to Rule 15 of the Supreme Court Rules, the Petitioner, The Upjohn Company, hereby submits this Reply Brief addressed to a new point raised in the brief in opposition: i.e., that the "taking" issue was never properly presented, preserved, or decided in the state court system. Given the context in which it arose, the issue was, in fact, properly preserved and presumptively considered.

To appreciate this point, it is necessary to understand that the "taking" issue arose out of a discovery controversy. That the "taking" came clothed in the garb of a discovery order does not detract from the fact that the "taking" claim was expressly presented to the trial court.

An attempted appeal at this point was the only manner in which the "taking" claim could be meaningfully reviewed. In dismissing the appeals on this issue for lack of a final judgment, citing *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987), the Connecticut appellate courts effectively rendered the "taking" issue unreviewable. For these reasons, the "taking" issue was properly presented below for purposes of this petition.

As the Respondent indicates at page 5 of her brief in opposition, the Petitioner expressly raised the constitutional "taking" issue in its Motion to Reargue Plaintiff's Motion to Compel. Specifically, the Petitioner stated in the trial court as follows:

> The Court's ruling may also constitute a "taking" of private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution

> and Art. I, § 11 of the Connecticut Constitution. Although the court has not prohibited Upjohn from using its own data base, the Supreme Court has noted: "Government action short of acquisition of title or occupancy, has been held, if its effects are so complete as to deprive the owner of all or most of his interests in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984). Here, the court's ruling will have tremendous and unfair economic impact. It would undermine "all or most" of the value of the Halcion database by giving plaintiffs an important tool created and used by Upjohn's attorneys to advise and defend Upjohn in litigation.

Defendant The Upjohn Company's Motion to Reargue Plaintiff's Motion to Compel, December 12, 1995, at 5 n.2.

This text clearly raised the constitutional issue for the trial court's consideration. The standard for preservation as articulated by *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) has been satisfied.* In denying the Motion to Reargue, the trial court is presumed to have rejected the "taking" claim.

The appellate courts have effectively ratified the trial court's rejection of the "taking" claim by pretermitting any merits review. The Petitioner was never permitted to address the constitutional issue in the Appellate Court or the Connecticut Supreme Court due to the procedural posture of the appeal.

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* The "taking" issue was considered properly presented in *First English* notwithstanding the arguable lack of specificity in its original articulation by the appellant as well as controversy about the means of disposition by the lower courts.

The issue presented in the original appeal was whether the court erred in ordering the production of the subject database. Because a Motion to Dismiss the appeal was granted, the substantive issues, including the constitutional issue, were not permitted to be presented to the Appellate Court. The same procedural result occurred upon the filing of a petition with the Connecticut Supreme Court. Because of the final judgment rule, the Petitioner was not permitted to file briefs in any Connecticut appellate court on any issue. There was thus never an opportunity to present or argue the merits of the "taking" issue in the Connecticut appellate system.

The Connecticut cases cited by Respondent regarding waiver of an issue on appeal are inapposite. In *Hayes v. Smith*, 194 Conn. 52, 480 A.2d 425, 433 n.12 (1984), the Connecticut Supreme Court specifically noted that the point held to be waived was one not raised in either brief or oral argument. "[Plaintiff] has not developed this claim at all either in her brief or in oral argument before us." *See also Bridgeport Hosp. v. Com'n on Human Rights and Opp.*, 232 Conn. 91, 653 A.2d 782 (1995) (fully briefed and argued). In stark contrast, because of the unavailability of interlocutory appeal of the "taking" issue in this case, no brief could be filed or argument presented on any issue in any appellate court.

The record in this case is largely an artifact of a process in which the substantive "taking" issue became unreviewable because of its procedural context. If this petition is dismissed because of Respondent's procedural objections, a true review on the merits will never be obtainable. The final judgment rule and the policy against interlocutory appeals in the Connecticut state courts will ensure that this important

and potentially recurring "taking" issue will never see the light of day.

For these reasons, the petition should not be rejected on the ground that the issue was not properly presented below.

Respectfully submitted,

Of Counsel:
R. CORNELIUS DANAHER, JR.
VINCENT A. ERRANTE, JR.
DANAHER, TEDFORD, LAGNESE & NEAL, P.C.
700 Capitol Place
21 Oak Street
Hartford, CT 06106-8000
(860) 247-3666

ANDREW SEE
(Counsel of Record)
PAUL D. SNYDER
SHOOK, HARDY & BACON L.L.P.
2800 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
(816) 474-6550
Counsel for The Upjohn Company